UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872, AFL-CIO,

and Case 28-CB-065507

STEPHANIE SHELBY, An Individual

Larry A. Smith, Esq., for the Acting General Counsel.
David A. Rosenfeld, Esq. and Caren P. Sencer, Esq. (Weinberg, Roger & Rosenfeld) for the Respondent Union.

DECISION

STATEMENT OF THE CASE

Gerald M. Etchingham, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on February 22 and 23, 2012. The Charging Party, Stephanie Shelby (Ms. Shelby or the Charging Party), filed the original charge on September 27, 2011[1], which was later amended on November 30, and the Acting General Counsel issued the complaint also on November 30. The complaint alleges that Laborers' International Union of North America, Local 872, AFL-CIO (Respondent or union) has operated an exclusive hiring hall at its Las Vegas facility and provided union members with employment referrals for construction industry jobs in the Las Vegas metropolitan area in an arbitrary and discriminatory manner in violation of Sections 8(a)(3) and 8(b)(1)(A) and (2) of the of the National Labor Relations Act (the Act).

Specifically, the Acting General Counsel alleges that the Union, from August through October, and especially through an incident occurring on October 4, has unlawfully threatened Ms. Shelby with exclusion from the Respondent's hiring hall and summoned the police in order to have her removed from the hiring hall because she engaged in union and other protected concerted activities. In addition, the complaint alleges that since October 4, the Respondent has unlawfully imposed a rule restricting Ms. Shelby's access to the hiring hall without police escort and restricted her ability to be referred to employment for other arbitrary and discriminatory reasons. (GC Exh. 1(e).[2])

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[1] All dates are in 2011 unless otherwise indicated.

[2] For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s); documentary evidence is referred to either as "GC Exh." for a Acting General Counsel exhibit, "R. Exh." for a Respondent union exhibit; reference to the post-trial briefs shall be "GC Br." for the Acting General Counsel's brief, and "R Br." for Respondent union's brief, followed by the applicable page numbers.

The Respondent denies the allegations in their entirety. Although the Respondent admits that it runs an exclusive hiring hall, it denies that it violated the Act in any respect and it asserts that Ms. Shelby's conduct on October 4 was not protected by the Act. (GC Exh. 1(g).)

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally,[3] and to file post-hearing briefs. On March 29, 2012, said briefs were filed by counsel for the Acting General Counsel and the Respondent and have been carefully considered. Accordingly, based upon the entire record[4] here, including the post-hearing briefs and my observation of the credibility of the several witnesses, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Jurisdiction is uncontested. The Respondent admits, and I find, that Perini Building Company (Employer), an Arizona corporation, with an office and place of business in Henderson, Nevada, has been engaged as a general contractor in the construction industry doing commercial construction; that as Employer, it, as well as other employers, are parties to collective-bargaining agreements with the union; that it performed services valued in excess of $50,000 in States outside Nevada during the past year ending September 27; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exhs. 1(e) and 1(g); Tr. 17–18.)

II. The Alleged Unfair Labor Practices

A. Background Facts

The parties further admit, stipulate to, and I find that at all material times since at least July 1, 2005, the Respondent and the Employer, as well as other employers engaged in commerce within the meaning of the act, have been parties to collective-bargaining agreements (Agreements) requiring that the Respondent be the exclusive source of referral for employment with the Employer and other employers through the Respondent's employment referral system. I further find that the Respondent, through the operation of its employment referral system has maintained records of its employment referral system at its facility in Las Vegas, Nevada and has required its members and those individuals using its employment referral system to report to the respondent's hiring hall facility on a periodic basis in order to maintain their eligibility for referrals. (GC Exh. 1(e) at 2; GC Exh. 1(g) at 1.)

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[3] At hearing, the Union requested that I reconsider my 2/16/12 order granting Charging Party's petition to revoke the union's subpoena. I ruled that the union had failed to timely respond to the petition despite having two opportunities to timely review and respond to the petition to revoke. Under the unique circumstances here with a pro se Charging Party filing a petition to revoke, I deny the motion for reconsideration. Tr. 12-15.

[4] I hereby correct the transcript as follows: Tr. 10, line 6: "LUCERO" should be "SHELBY"; Tr. 41, line 6: "very" should be "vary"; Tr. 45, line 8: "set" should be "sit"; Tr.125, line 10: "though" should be "that"; Tr. 137, line 15: "Ms. Sencer:" should be deleted; and Tr. 303, line 4: "Hear" should be "Here…."

The parties further admit, stipulate to, and I find that the Respondent operated an exclusive hiring hall for construction work at its facility at 2345 Red Rock, Las Vegas, Nevada (hiring hall), where the incidents referred to below occurred from August through October. (Tr. 10-11.) Furthermore, the parties admit, stipulate to, and I find that Respondent's hiring hall manager Joe Taylor (Mr. Taylor) and one of its dispatchers, Rocio Lucero (Ms. Lucero) are agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 9-10, 35-36.)

B. The Union's Referral System and Events at the Hiring Hall before October 4.

Mr. Taylor explained that for the last 7 years up to the hearing, he has held the appointed position of labor director of Southern Nevada Laborers, Employers Cooperation Education Trust for the union, a full-time position and he reports to the organization's Board of Trustees comprised of individuals from labor and management. (Tr. 32-33, 69.) Mr. Taylor's main job responsibility is to focus on "marketing and procurement of work for our [union] members." (Tr. 33.)

In addition to his regular dealings with union members, Mr. Taylor also interacts with contractors, owners, and developers at his job at the hiring hall. (Tr. 34, 46-47.) The hiring hall is also the main place for laborers to get employment. (Id.) Mr. Taylor does not always wear an identifying union logo shirt while working though he estimates that he wears a shirt with his name on it and a varying union logo reference, including occasionally Local 872, three out of the five days he works. (Tr. 53-54.) Mr. Taylor works out of an office located on the second floor of the hiring hall. (Tr. 55.)

Ms. Shelby has been a union dues paying member of Respondent continuously since 2003. (Tr. 157.) She is a skilled laborer who gets jobs exclusively through the Respondent. (Tr. 158.) Ms. Shelby has skills in being a flagger, water truck operator, forklift operator, electric power jack operator and she can operate hand tools. (Id.)

As of the date of hearing, the Respondent had approximately 3,400 members locally who are primarily construction workers. (Tr. 34-35, 109, 120, 158.) Mr. Taylor further explained that the Respondent places its members in work through the out-of-work list and that generally a member is placed on the list when he or she is out of work and progresses up the list when members above them on the list are put to work through a process called dispatch. (Tr. 35, 108; GC Exh. 3.)

Union members are required to call in to dispatch 8 times a year within the first three days of a month to comply with roll call requirements or lose their spot and revert to the bottom of the list. They must also come into the hiring hall in person 4 times per year depending on their last name within the same first three days of a new month or to get back on the out-of-work list. (Tr. 42-43, 140-41, 147, 163; GC Exh. 3.)

Ms. Lucero opined that in October 2011, there were approximately 1200 people on the out-of-work list and it took over a year to work one's way up to the top of the out-of-work list. (Tr. 141.) If one works 80 hours, they lose their spot on the out-of-work list and must go to the bottom if they become laid off. (Tr. 163-64.) When the phone-ins occur, the Respondent member is given a six-digit confirmation number that they must keep to confirm their proper registration on the out-of-work list. (GC Exh. 3 at 1.)

The out-of-work list is viewable by union members at the hiring hall and it shows where on the list an unemployed worker is and how quickly they are moving up the list. (Tr. 43-44, 46-47, 110, 164.) Also at the hiring hall at the outside of the building is the dispatch list that shows

which members got dispatched to jobs and how many jobs were called out over a certain period of time. (Id.)

Union members are usually matched up with employers based on their skills with the Respondent maintaining a list of these skills for each Respondent laborer member. (Tr. 39-40, 109, 142.) Mr. Taylor admitted that a Respondent member's documented skills with the Respondent affect their employment and that a Respondent member on the out-of-work list can be passed up by a member lower on the list, if the member with the higher rank does not possess the requisite skills for a job and the lower ranked member does. (Tr. 40, 142, 158.) Mr. Taylor also opined that some employers' hiring requirements have limitations based on a Respondent member's criminal history though he was unaware of any list of members' criminal histories maintained by the Union. (Tr. 49.)

Mr. Taylor further explained that a skill set is the training that the union members have received and/or certification that a member receives upon successful completion of training. (Tr. 70.) In order to prove that a union member has a currently valid skill, a member must bring in the written certification from training or a paycheck stub that shows they actually worked hours performing a skill task if their skill was not obtained at training but as on-the-job experience. (Tr. 70.) Union members must bring their employer, state, or federal certifications or licenses to dispatch in order to maintain or update their current skill set and must verify with dispatch that it has been noted on their skill set. (Tr. 71, 110.) Thus, to update their skill set, a union member must provide dispatch with the documentation referenced above. (Id.)

A second track or method for a Respondent member to secure work in addition to the out-of-work list is for the worker to be name requested by an employer who requests a laborer by name so that they can get work even if they are at the bottom of the out-of-work list. (Tr. 35-35, 141-42; GC Exh. 3 at 4-5.) The name request method allows laborers to work continuously outside of the out-of-work list method. (Tr. 37.)

Ms. Lucero, Susan Martin, Ian Thienes and someone named Devin are the four staff members who, work at the dispatch windows where Respondent members go for their dispatches, paying union dues, getting copies of their skill sheet, adding a skill, asking questions about filing a grievance or complaint, and handling roll-call at the hiring hall. (Tr. 41-42, 108, 110-12, 144, 148, 153, 162.) Ms. Lucero opined that anyone behind the dispatch window could help a union member about straightening out their skill sheet. (Tr. 127.) Mr. Taylor also explained that a Respondent member may also go to the dispatch window to meet with their business agent at the hiring hall to discuss filing a grievance or to set up an appointment to meet with them later if they are not at the hiring hall at that time. (Tr. 45-46.) Mr. Taylor opined that 99 percent of the time, the business agents are not at the hiring hall but rather they are out patrolling job sites. (Tr. 44-46, 70.)

Ms. Lucero has been working for the Union as a dispatcher, an appointed position, for four years and reports to Tommy White in her position. (Tr. 107.) She described Mr. Thienes as a cashier who works with her behind the banker's glass at the hiring hall. (Tr. 111.)

In addition to visiting the dispatch windows, Ms. Shelby would occasionally go to the health and benefits office on the second floor to check on her pension, her credits, and to verify that she was current on her insurance premiums. (Tr. 165.) This upper floor section is accessible by way of elevator or stairs as per Mr. Taylor. (Tr. 46.) He also opined that the lobby area where dispatch is located is on the first floor comprised of approximately 700 square feet and the entire hiring hall is approximately 26,400 square feet. (Tr. 54-55.)

Mr. Taylor described seeing Respondent members frequently curse, yell, and be upset at the hiring hall because of the length of time they remained unemployed and on the out-of-work list. (Tr. 37-39.) Mr. Taylor opined that cursing and yelling in the hiring hall was not unusual because of the construction work nature of Respondent laborers and that he also curses and yells. (Tr. 38-39, 109.) Mr. Taylor opined that he is exposed everyday, every hour, to Respondent members swearing at the hiring hall but not yelling. (Tr. 52.)

Mr. Taylor believes that Respondent members occasionally get mad, get angry, yell and cuss in front of him and that does not bother him but that there is a difference between this and becoming irate or psychotic. (Tr. 49.) Mr. Taylor, a former Marine, miner, and active in the construction industry for 25 years is not bothered by a woman swearing though he does not swear in front of women. (Tr. 49-51.) If, instead, Mr. Taylor is with a group of men, however, he freely swears. (Tr. 50.)

Mr. Taylor explained that he created the normal, unwritten practice or procedure the Union uses at the hiring hall when he has an irate or very upset union member in front of dispatch. The procedure is for Mr. Taylor to get them out of the building, away from staff, and other union members and ask them to leave. (Tr. 82-83, 87, 90-91, 98.) Respondent also does not have a published policy or rule against cursing and there are no “No profanity” signs or anything like that at the hiring hall. (Tr. 125-26.) Profanity amongst union members is common in Respondent’s hiring hall, including by some of its agents but not profanity directed at dispatchers. (Tr. 38-39, 50-52, 125.)

Mr. Taylor estimates that over the past three and a half years that the current hiring hall has been open and everybody is housed in the same building, he has escorted 5 or 6 Respondent members out of the building. (Tr. 52, 73.) He believed that of those 5 or 6 times, only one time did he call Metro, the Las Vegas police, when a man took a few steps while also being physically aggressive toward him with his fist “hauled up.” This individual, however, left the premises on his own, half way through the call to the police so Mr. Taylor disregarded having the police come out to the hiring hall. (Tr. 73, 92.) Before then, Mr. Taylor was called to come over and escort one other person out of the former hiring hall but he never caused a union member to be cited off the hiring hall premises for trespassing before Ms. Shelby. (Tr. 52-53, 73, 86.) Mr. Taylor did recall that union members David McCann, George McDonald, and Charles Porter had been trespassed away from the hiring hall by someone else more than 3 years ago for threats of violence with a knife and a broken window involved in two of the three events. (Tr. 92-95; GC Exh. 4.) Ms. Lucero recalled one incident before the present hiring hall location which caused the local police to arrive and involved a union member and a threat at the building. (Tr. 129.)

Mr. Taylor also opined that a Respondent member cannot just go into the hiring hall and sit down with a dispatcher due to safety concerns and the fact that the dispatchers work behind thick bulletproof glass like bankers’ glass. (Tr. 47-48, 72, 167.) As a result, a member cannot get from the lobby to the dispatch office without going through a key-coded door by being buzzed in. (Tr. 48, 112, 167.) Ms. Lucero added that there is also a space next to the dispatch area that no one is allowed access to in another room on her side of the key coded door where union members can use to sit at a table and fill out paperwork at times. (Tr. 112.) Respondent members can talk to dispatchers through the tray opening at the dispatch window and it is not hard to hear from either side of the glass. (Tr. 48, 72, 167.)

C. Events involving Ms. Shelby from August 1 through October 4.

Other than jobs she obtained in November and December, Ms. Shelby was on the out-of-work list throughout the rest of 2011. (Tr. 163.)

Ms. Lucero described three or four times from August 1 through October 4 when Ms. Shelby came to dispatch with some concerns about her skills sheet, her position on the out-of-work list, her rotation number in relation to that out-of-work list, a dispute about a missed roll call, and about filing a grievance over the information on the missed roll call. (Tr. 113, 115, 139-41.) Before that time, Ms. Lucero recalled Ms. Shelby's employer name request dispatches as a dispatcher including one from Southern Nevada Flaggers, Barricades, and Flagging. (Tr. 116.)

Ms. Shelby described her concerns as involving deleted skills that she discovered in August. (Tr. 165 189.) She determined that Ms. Lucero deleted the skills as Ms. Lucero left her initials next to the date listed for deletion. (Tr. 223.) Ms. Shelby believes that her skills have been deleted on her skill sheet since 2009 and that was something she said she "took to the union." (Id.) Ms. Shelby said she spoke to Susan Martin a couple of times and on August 26, Ms. Shelby asked her for a printout of her skill sheet. (Tr. 166-67.)

Also, Ms. Shelby explained that on September 12, she went to the hiring hall and she was reviewing the out-of-work list and Ms. Shelby asked Ms. Lucero what the December 10, 2010 date meant next to Ms. Shelby's name on the list. (Id.) Ms. Lucero responded "That's when you get back on the out-of-work list." (Id.) Ms. Shelby disputed the accuracy of the list as she believed that she had gotten on the list as of August 16, 2010 and had not missed any roll-calls. (Id.) Ms. Lucero offered to take Ms. Shelby back inside the hiring hall and when she pulled up Ms. Shelby's name she saw that Ms. Shelby had apparently missed a November 2010 roll call. (Id.) Ms. Shelby says next she asked Ms. Lucero for a printout and she gave Ms. Shelby a printout and purportedly on the printout it proved, according to Ms. Shelby, that she did not miss the November 2010 roll call and it also proved that Ms. Lucero deleted something off of Ms. Shelby's records on December 3, 2010. (Tr. 165-66.)

Ms. Shelby further added that she returned to the hiring hall on September 16 and again spoke to Ms. Lucero and Ms. Shelby asked her "Can I file a grievance?" and purportedly Ms. Lucero responded by yelling at Ms. Shelby "Are you kidding me, are you kidding me, for what Stephanie, for what, you don't have nothing." (Tr. 166.) Ms. Shelby responded to Ms. Lucero by saying that Ms. Lucero told her that she missed roll call in November 2010 and Ms. Shelby did not think she did. Ms. Shelby responded by telling Ms. Lucero that she needed to be talking to Ms. Shelby's lawyer. In further response, Ms. Lucero yelled "Bye, bye." (Id.)

Ms. Lucero further admits that she had this heated confrontation with Ms. Shelby and voices were raised. (Tr. 114-15.) Ms. Lucero confirmed that while she had a heated confrontation with Ms. Shelby before October 4, the police were not called in, Ms. Shelby was not trespassed off the hiring hall premises, Ms. Shelby did not threaten Ms. Lucero, and Ms. Lucero did not have to call anyone to escort Ms. Shelby out of the building. (Tr. 115.) Heated conversations were not unusual to Ms. Lucero though before October 4, they always resulted in the members voluntarily leaving the premises without incident and the members returning the next day to apologize for their part in creating the heated conversation.

On September 27, Ms. Shelby went to the hiring hall to pay her union dues and she asked Susan Martin for a printout "to prove that [Ms. Shelby} didn't miss roll call for December [2010]" and Ms. Martin purportedly told Ms. Shelby she could not provide her with such a printout. (Tr. 166.)

On October 3, a date that Ms. Shelby had to appear in person at the hiring hall for roll call, she attempted to upgrade her skill sheet and the dispatchers asked Ms. Shelby to bring back her certification and Ms. Shelby intended to bring it back the following day – October 4. (Id.)

Ms. Lucero agreed that each of these issues that Ms. Shelby came to dispatch for during this time period were not resolved to Ms. Shelby's satisfaction. (Tr. 116, 139.) Ms. Lucero explained that the problem with Ms. Shelby's skill sheet was that her "flagger" certification on file at dispatch had expired which deletes this skill from the skill sheet and Ms. Shelby needed to provide a current certification. (Tr. 139-40.) Ms. Lucero also confirmed that a union member can put a deleted or expired skill back once they provide proper certification. (Tr. 140.)

Ms. Lucero was also aware of a problem that Ms. Shelby had with her position on the out-of-work list as Ms. Shelby believed that she should be higher on the list. (Tr. 140-41.) Ms. Lucero told Ms. Shelby that it was probably because Ms. Shelby missed roll call and that she would have to get back on the list to correct the situation. (Id.) At no time did Ms. Shelby provide any six-digit confirmation number to prove that she did not miss a November 2010 roll call. (See GC Exh. 3 at 1.) Ms. Lucero further explained that with respect to Ms. Shelby's belief that she did not miss a roll call and that dispatch had made a mistake as to her low position on the out-of-work list, Ms. Shelby did not file a grievance even though Ms. Lucero told Ms. Shelby that she would need to put her complaint about her concern of her low out-of-work position in writing and submit it to Tommy White, Ms. Lucero's boss. (Tr. 141, 147-48.)

Ms. Shelby also attempted to correct some of the same problems she perceived with Respondent by writing a series of letters to Respondent's headquarters addressing various issues. These letters included: an August 15 letter to Respondent's president alleging sexual harassment; a September 16 letter to the president about Ms. Lucero's deletion on Ms. Shelby's skills; a letter about an alleged September 12 phone call from Respondent which was sent to headquarters; a letter dated September 19 about the out-of-work list; a letter regarding Joe Ford III; a letter regarding her request for a roll call printout; and another letter regarding the deletion of her skills. (Tr. 217-18, 222-25.) Ms. Shelby also sent the letters to Respondent's headquarters to inform them of the problems and to resolve the issues internally. (Tr. 232.) The issues had not been resolved prior to October 4. (Tr. 113.)

D. The October 4 Incident

On October 4 Ms. Shelby returned to the hiring hall lobby and handed her transcript to Ms. Lucero as a follow-up to being there the day before in an attempt to upgrade her skill sheet. (Tr. 123, 167.) This discussion was a continuation of the previous issues which Ms. Lucero had been discussing with Ms. Shelby since August 1. (Id.) Ms. Shelby brought some transcript sheets to Ms. Lucero and the two had a disagreement about whether these transcript sheets were adequate to update Ms. Shelby's skills. (Id.)

On October 4, after handing to Ms. Lucero what Ms. Shelby thought was needed to update her skill sheet, Ms. Lucero responded by stopping Ms. Shelby and saying "This is not your certification." (Tr. 167.) Ms. Shelby responded by asking Ms. Lucero "Well, what is it?" (Tr. 168.) Ms. Lucero repeated herself and said "It's not your certification." (Id.) Ms. Shelby repeated her question – "Well, what is it?" (Id.) Ms. Lucero responded saying "Look, Stephanie, what's the problem you have with me?" (Id.) Ms. Shelby responded by saying "I don't have no [sic] problem with you." (Id.) At this point, Ms. Shelby says that Ms. Lucero started yelling again. (Id.)

In response to this, Ms. Shelby said to Ms. Lucero: "Look bitch, I'm not gonna let you disrespect me like you did last week" or something similar and actually meaning their last encounter on September 16 where Ms. Shelby, now had twice called Ms. Lucero a bitch. (Tr. 124-25, 143, 168-69.) Ms. Shelby asked for a return of her transcript papers and Ms. Lucero, refused to return the papers and, in a raised tone of voice, immediately asked Ms. Shelby to leave and Ms. Shelby did not appear to Ms. Lucero to want to leave. (Tr. 125, 145, 150, 168-69.) Ms. Lucero also claims that she told Ms. Shelby that Ms. Lucero was not going to talk to Ms. Shelby if she was going to talk to her by calling her a profanity. (Tr. 126.) Next, Ms. Lucero says to Ms. Shelby that if she doesn't leave, Ms. Lucero was going to call the Las Vegas Metro (police) and Ms. Lucero continued to hear Ms. Shelby yelling and screaming. (Tr. 126, 143.) Finally, Ms. Lucero says "ok" and she picks up the telephone and calls Mr. Taylor to come escort Ms. Shelby out of the hiring hall. (124-25, 131, 143.)[5] Ms. Lucero did not call 911 because of Ms. Shelby's statement, Ms. Lucero did not see any weapon in Ms. Shelby's possession, she was not threatened by Ms. Shelby, and Ms. Lucero agreed that Ms. Shelby could not touch Ms. Lucero because she was behind the dispatch counter glass.[6] (Tr. 124-25, 129.) Ms. Lucero did credibly say that Ms. Shelby's outburst was belligerent and made her feel "nervous" and concerned. (Tr. 145.)

Ms. Lucero estimated that her conversation with Ms. Shelby lasted from 10 to 15 minutes and that Ms. Shelby was the first one to raise her voice as she appeared not to like Ms. Lucero's explanation of what Ms. Shelby needed to update her skill sheet. (Tr. 142-43.) Ms. Shelby's account of the disagreement is different and she claims that Ms. Lucero raised her voice first as she had previously done on September 16. (Tr. 167-68, 196.) There is no dispute that at some point in their conversation, Ms. Lucero also raised her voice. (Tr. 145.) Normally, Ms. Lucero tries to calm union members down when they begin to get upset and raise their voices and she opined that normally the upset member will just voluntarily leave the dispatch window. (Tr. 143 146.)

Ms. Lucero claims that being called a bitch by Ms. Shelby is what caused her to end her conversation with Ms. Shelby and, Ms. Lucero did not know of any other situation in dispatch where a union member's cursing was *directed at her* like Ms. Shelby's rather than simply in her presence and not directed at her. (Tr. 125, 146, 149-50, 154.) Ms. Lucero has never had to call for somebody to be escorted out of the hiring hall because they usually just leave when they are upset or irate and come back later and apologize. (Id.)

Mr. Taylor also worked on October 4 and explained that received a phone call from Ms. Lucero in dispatch stating that he needed to come downstairs because there was a member who was irate and he explained that he could hear the member over the phone. (Tr. 55-56, 126.) Ms. Lucero did not tell Mr. Taylor why Ms. Shelby was upset. (Tr. 57, 127.) Mr. Taylor

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[5] Normally there is a surveillance camera that monitors the activity in the lobby/dispatch area and this surveillance film was properly subpoenaed by the Acting General Counsel in this case. Respondent's counsel represented at hearing, however, that on the day in question, October 4, the surveillance system was down or not functioning and was down for 3 weeks. Tr. 131-38.

[6] Later on cross-examination, Ms. Lucero changed her testimony from not feeling threatened at any time by Ms. Shelby to saying she felt intimidated by Ms. Shelby's October 4 outburst. Tr. 144, 151. I reject Ms. Lucero's changed testimony and I do not find this new testimony credible given Ms. Lucero's position as Respondent's admitted agent and because I found her initial opinion that she was not threatened by Ms. Shelby more genuine and believable having observed her testify at hearing. See Tr. 124-25, 129, 145.

opined that occasionally he can hear some of the things that are going on in the lobby from his second floor office. (Tr. 55.) Mr. Taylor recalled that this is exactly what he heard on October 4 when he exited his office - he heard a female screaming and yelling. (Tr. 56, 72.)

Mr. Taylor proceeded to go downstairs to the lobby but claims he took the elevator instead of using the stairs as Ms. Shelby convincingly recalled. (Tr. 56, 60.) I found Ms. Shelby's version of what happened on October 4 more credible than Mr. Taylor's version. I find that Mr. Taylor, an ex-Marine who appeared fit at hearing, performing his customary role as the hiring hall bouncer is more likely to have immediately darted down the stairs to protect dispatch than to have waited for an elevator to arrive, open, and slowly descend to the first floor. (Tr. 51-52, 69-70, 86, 90-91, 96.) I also find it more reasonable that Mr. Taylor could get downstairs more quickly using the stairs and that in circumstances involving a potential threat of violence especially given Mr. Taylor's knowledge of past history and events involving threats of violence at the hiring hall. Mr. Taylor admitted that he went downstairs for the limited purpose of removing from the lobby and building the individual that Ms. Lucero called him about being irate. (Tr. 57-58.)

When Mr. Taylor first saw Ms. Shelby on his arrival downstairs he saw her standing just inside the lobby side of the dispatch area about five or six feet away from the dispatch window in the lobby. (Tr. 56, 74.) Mr. Taylor does not recall seeing anyone else in the lobby except Ms. Shelby as he was only focused on her. (Tr. 60, 74.) He claims his first words to Ms. Shelby on arrival were "calm down, calm down." (Tr. 57, 74-75.) Ms. Shelby convincingly recalled that he came down the stairs yelling and screaming at her to get out, get out, you are 86'ed.[7] (Tr. 169-70.) Mr. Taylor recounted that Ms. Shelby's response to him after he took one step toward her was "Don't put your hands on me" "don't touch me" in an irate manner where he further told her "Ma'am you need to leave the building." (Tr. 57, 74-75, 127, 170.) Neither Ms. Shelby nor Mr. Taylor had ever seen or knew each other before this encounter. (Tr. 57, 74-75, 127, 169.) Mr. Taylor denies touching Ms. Shelby or putting his hands out such as if he was going to touch her though Ms. Shelby described him as approaching her as if he was going to grab her. (Tr. 75, 170.) He confirmed that Ms. Shelby had no idea who he was either based on her comments. (Tr. 97, 169, 172.)

After he told her she needed to leave the building, he recalled seeing Ms. Shelby take two or three steps backward toward the exit door before he repeated that she needed to leave. (Id.) Next, Mr. Taylor describes Ms. Shelby as starting to walk again out the exit door and stopping and starting to scream in an awful pitch. (Id.) He could hear Ms. Shelby saying something about papers, deleting her skills, and how the union is against her and discriminates. (Tr. 75-76, 98.) Mr. Taylor estimates that from the time that he came downstairs until the time that he called the police, a little over 2 minutes had passed with the exchange between Ms. Shelby and him with Ms. Shelby slowly making her way out of the building and occasionally cussing - the gist of which included statements from Ms. Shelby such as "Why are you mother-fuckers against us all the time" and "Why ya'll want to screw with us." (Tr. 75-76, 95-96, 170.) Ms. Shelby recalled saying to Mr. Taylor – "Motherfucker, you better not touch me." (Tr. 170-71.)

Mr. Taylor did not think he and Ms. Shelby had any physical altercations and he was not threatened by Ms. Shelby, nor did he know or think she had threatened anyone or had a weapon when he arrived to escort her off the premises. (Tr. 58, 65.) Mr. Taylor followed Ms. Shelby out of the building to make sure that she did not come back through the front doors.

[7] Being "86'ed" is understood to mean trespassed off the property. Tr. 61, 130.

(Tr. 76-77.) Mr. Taylor admitted eventually calling 911 after Ms. Shelby was already outside the building to have Ms. Shelby trespassed off the property.[8] (Tr. 58, 61.) He explained that he usually just asks an irate union member to leave the building and does not need to call the police. (Tr. 83.) Mr. Taylor decided to call the Las Vegas police, the Metro, on October 4, because Ms. Shelby was so irate and he did not know what she was going to do or capable of doing and she refused to leave the parking lot. (Id.)

Mr. Taylor believed he was just outside the front doors of the hiring hall when he called 911 and that Ms. Shelby was also outside the building in the parking lot and approximately 40 plus feet away from where he was standing. (Tr. 58-59, 79, 83.) Ms. Lucero remains behind glass at her dispatch post inside the building when Mr. Taylor called the Las Vegas police. (Tr. 59.) Mr. Taylor remained standing in from of the front door of the hiring hall and described Ms. Shelby as not leaving the premises and not calming down in the parking lot, ranting and raving all the time while the police were on their way in response to his call. (Tr. 77, 83, 171.) Ms. Shelby admits that she told Mr. Taylor after he called the police that she refused to leave the premises. (Tr. 171.)

Approximately 20 minutes after Mr. Taylor called 911, the police arrived to the hiring hall parking lot in response to the 911 call, they talked to Mr. Taylor, and he asked them to trespass Ms. Shelby. (Tr. 60-61, 77, 128.) Ms. Shelby immediately calmed her yelling down but starting to cry when the police first arrived. (Tr. 83-84, 173.) Despite her calming down when the police arrived, they still proceeded to handcuff Ms. Shelby. (Tr. 98-99, 173.)

The police took Ms. Shelby to a second police car where she sat handcuffed while one policeman went into the hiring hall with Mr. Taylor. (Tr. 173.) The police also spoke to Mr. Taylor who gave them his version of the events – that he was called downstairs, Ms. Shelby was irate, Mr. Taylor asked her to leave the premises, she wouldn't leave the premises, and he called the police. (Tr. 84-85.) The police then asked Mr. Taylor if he wanted to trespass Ms. Shelby and he told them yes, he did. (Tr. 85.) Based on what Mr. Taylor told them, the police then issued Ms. Shelby a trespass notice or an 86. (Tr. 61, 130, 156-57, 276; GC Exh. 5 at 2. Mr. Taylor considered himself an officer of Respondent and read the following language to Ms. Shelby:

> As a duly appointed representative of the owner of the property, I hereby warn you that you are trespassing upon this property as defined by the Nevada Revised Statute 207.200. If you do not leave these premises immediately, you will be subject to arrest for a misdemeanor. Your subsequent return to the premises after being duly warned not to return will subject you to immediate arrest for trespassing.

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[8] Respondent attempts to make reference to the October 4 conversation from the 911 operator at the Las Vegas police. An audio disk CD purportedly of the 911 call from October 4 between Mr. Taylor and Las Vegas police was entered into evidence conditioned on there being an accompanying written transcript. (Tr. 78, 302-08; R Exh 1.) Moreover, at hearing, Respondent was directed by me to provide a written transcript of the audio CD from the Court Reporter or through joint stipulation of the parties or a motion if someone else transcribed the CD disk for the record in this case. (Tr. 78, 302-08.) Respondent did not provide a written transcript as represented at the end of hearing and I reject the CD and any reference to the 911 call operator without a verifying written transcript. Moreover, contrary to a joint agreement between the parties at hearing, no Motion was filed with a transcript of the audio from the 911 call to review or to consider. See Tr. 306.

(Tr. 85, 99 173, 276; GC Exh. 5 at 2.) Mr. Taylor further interpreted the trespass notice as meaning that if Ms. Shelby ever came back to the hiring hall premises, she would be arrested. (Tr. 85; GC Exh. 5 at 2.)

The Las Vegas police proceeded to cite Ms. Shelby for trespass. (Tr. 61-62; GC Exh. 2.) After reading from the trespass card, Mr. Taylor went into the hiring hall and the police told Ms. Shelby that she was in handcuffs because she was upset but after Mr. Taylor read the card and Ms. Shelby was cited for trespass, the police took off the handcuffs and told her to wait awhile before driving home so she would not be too upset to drive safely. (Tr. 173-74.) Ms. Shelby left the premises before the police. (Tr. 174.)

Following Ms. Shelby's exit from the premises, Mr. Taylor did not submit a report, an email, or anything else to document the incident. (Tr. 99-100.)

E. Ms. Shelby's Status at the Hiring Hall After October 4.

On October 5, Ms. Shelby called the dispatch office at 6:30 a.m. and asked for Susan Martin who was not in. (Tr. 175-76.) Instead, Ms. Lucero answered the telephone and Ms. Shelby apologized to her for her behavior the day before and asked if she could send her a skill sheet. (Id.) Ms. Lucero responded to Ms. Shelby by saying that she needed a CDL (commercial driver's license) to drive the water truck and Ms. Lucero sent Ms. Shelby a skill sheet. (Id.)

Mr. Taylor confirmed that he was told by the union's business manager, secretary-treasurer Tommy White, that since the October 4 incident, Ms. Shelby called into the hiring hall and apologized to the union for her October 4 behavior. (Tr. 67-68.) Ms. Lucero was also aware that Ms. Shelby had called the hiring hall on October 5 and apologized for her behavior on October 4 but Ms. Lucero denies talking directly to Ms. Shelby or sending her a skill sheet. (Tr. 129-30.) Mr. Taylor was also aware of another apology by Ms. Shelby to Ian Thienes at dispatch on the first day of this hearing through John Stevens (Mr. Stevens), a business agent for the union. (Tr. 68.)

After the October 4 incident and Ms. Shelby's trespass citation, Mr. Taylor believed that Ms. Shelby was permanently ordered off the premises and would not be allowed back to Respondent's hiring hall.[9] (Tr. 63, 85.) Ms. Shelby similarly thinks that after the trespass notice was issued against her, it remains active against her and she must have a police escort in order to go to the hiring hall. (Tr. 174.) Mr. Taylor was surprised to see her later at the hiring hall with a police escort. (Tr. 62, 85.) Mr. Taylor credibly admitted that by being trespassed on October

[9] Mr. Taylor's testimony vacillated on this subject. He was clear that by being trespassed on October 4, Ms. Shelby was permanently ordered off the premises and would not be allowed to come back onto the hiring hall property in the future because the trespass had an ongoing requirement of only being allowed access to the hiring hall with a police escort. Tr. 63-65, 85. He denied it was his intention or understanding, however, that the trespass would be ongoing and completely ban her from the property. Tr. 63-65. Mr. Taylor also did not understand that by receiving the trespass, Ms. Shelby would have the ongoing requirement of needing a police escort to return to the hiring hall. Tr. 62-63. Observing Mr. Taylor testify at hearing, I do not find credible his inconsistent statements that his actions in causing Ms. Shelby to be trespassed on October 4 do not affect her future and current access to the hiring hall property or require her to have a police escort especially when he said that the police told him the effect of trespassing Ms. Shelby was to permanently order her off the premises. See Tr. 63-65, 85.

4, Ms. Shelby would not be allowed to come back onto the hiring hall property in the future because the trespass had an ongoing requirement of only being allowed access to the hiring hall with a police escort. (Tr. 63-66.) Ms. Lucero admitted that her husband is a police officer. (Tr. 130.)

Ms. Lucero saw Ms. Shelby return to the hiring hall after October 4 with a police escort. (Tr. 129.) Mr. Taylor also admitted that he never took actions to remove the trespass or lift the trespass charge against Ms. Shelby even though he saw her two or three weeks after the October 4 incident with a police escort and he believed that it was a waste of resources. (Tr. 66.) He did question the police when they were escorting Ms. Shelby to the second floor to visit member services at this time and he asked the police "Why are you here (meaning Ms. Shelby) and why are you here (meaning the police). (Tr. 86.) The policeman responded to Mr. Taylor that he was escorting Ms. Shelby onto the hiring hall property to member services. (Id.) Mr. Taylor and Ms. Lucero believe that Ms. Shelby has visited the hiring hall property with her police escort three times since she first came back with the police escort and there have been no further issues involving Ms. Shelby or her conduct at the hiring hall. (Tr. 66-67, 87, 143-44.)

Mr. Taylor repeated that other than Ms. Shelby, he knows of only two other union members to be trespassed from the hiring hall property but those other two involved actual threats of violence and the two individuals trespassed for threatening violence had restraining orders issued against them. (Tr. 65, 88; GC Exh. 4.) Mr. Taylor recalled seeing one of the two union member removed from the hiring hall for threats of violence, Charles Porter, return to the hiring hall without a police escort as Mr. Taylor thought that Mr. Porter's restraining order was lifted 2 years after his event. (Tr. 89, 100.) Before the October 4 incident, Mr. Taylor had not removed a person from the hiring hall premises simply for yelling without a threat of violence or actual property damage. (Tr. 91-92.)

Ms. Shelby described getting jobs in November and December through the second track system at Respondent where her name had been requested by employers Southern Nevada Flagging and Barricade for a two day job on November 17 and 18, and with Six Star Cleaning beginning on December 16 where Ms. Shelby remained working through the time of hearing. (Tr. 159.)

III. ANALYSIS

A. Credibility

There were three primary witnesses in this case: Ms. Shelby, and the union agents employed at the hiring hall - Ms. Lucero and Mr. Taylor. The facts that follow are largely based on documentary evidence and the testimony of Ms. Shelby, Ms. Lucero, and Mr. Taylor. Except as noted hereafter, their testimony was mutually corroborative and their demeanor was entirely convincing. Ms. Shelby, however, impressed me with both her ability to recall the events and relate them as accurately as she could. Ms. Lucero and Mr. Taylor were entirely unconvincing as to specific facts referenced above such as Mr. Taylor's use of stairs on October 4 and Ms. Lucero's denial that Ms. Shelby called dispatch and apologized. I give more specific examples below why I have decided generally not to credit portions of their testimony unless it stands as an admission of a party opponent or is consistent with Ms. Shelby's recitation of key facts.

Ms. Shelby began to cry uncontrollably while testifying and I observed her to be a very emotional person consistent with her outburst on October 4. After observing Ms. Shelby's lack of control over her emotions at trial, I infer that on October 4 she had a similar emotional

outburst that she could not control that increased in intensity to her repetitive use of profanities directed at Respondent's agents, Ms. Lucero and Mr. Taylor, and this outburst advanced to belligerence and continued until the police arrived outside the premises.

Mr. Stevens was not credible with his conclusory descriptions of the past Respondent members who were trespassed and had been involved with incidents requiring them to be banned from the hiring hall for threats of violence or actual property damage which caused Respondent to actively follow up with restraining orders against these individuals. (See GC Exh. 4.) Mr. Stevens testified in a cavalier manner describing these prior incidents as merely involving overly boisterous and belligerent conduct which he opined was similar to that of Ms. Shelby's in this case. (Tr. 312, 314-19.) I reject this testimony and find that the circumstances involving Mr. McCann, Mr. Porter, and Mr. McDonald are highly distinguishable from the October 4 incident involving Ms. Shelby as discussed below. The three incidents before Ms. Shelby's October 4 incident all involved threats of violence where Respondent reacted reasonably by securing restraining orders against each individual. (GC Exh. 4.) Here, Ms Shelby simply cursed at a dispatcher but did not pose a threat to anyone yet she was permanently banished from the hiring hall premises the same as if she had threatened a union member with a knife as Mr. Porter.

I also reject Mr. Stevens' testimony regarding Ms. Shelby's apology as his initial recollection that she apologized to the union for the October 4 incident is contradicted later in his testimony in a manner I found to be unconvincing and unbelievable. (Tr. 246-47.) Moreover, Mr. Taylor and Ms. Shelby convincingly testified that Ms. Shelby apologized twice, once on October 5 and a second time on the day trial began in this case also contradicts Mr. Stevens' changed testimony on this subject matter. (Tr. 68, 175-76.)

In addition, contrary to Respondent's recitation of facts in its closing brief: (1) Ms. Shelby did not concede that she raised her voice toward Ms. Lucero first; (2) Ms. Lucero did not state that she was concerned for her safety with Ms. Shelby's outburst; (3) Ms. Shelby actually calmed down immediately when the police arrived; (4) the statement "your subsequent return to the premises after being warned not to return will subject you to immediate arrest for trespassing is very clear in its meaning and Mr. Taylor and Ms. Shelby both acknowledged its meaning that Ms. Shelby is not allowed back to the hiring hall premises without a police escort; (5) there is a claim that Respondent's conduct toward Ms. Shelby has restricted her ability to be referred to employment with other employers; (6) the Union did not impose a valid permanent no trespass order against Ms. Shelby that requires any further affirmative action from her beyond the apologies she has provided; and (7) the Union's permanent no access without police escort rule against Ms. Shelby had an impact on Ms. Shelby's employment as Respondent admits that Ms. Shelby "may be ever so slightly inconvenienced by being escorted by the police" and that to remove this permanent interference to her employment rule she must "take… appropriate action to ask the [U]nion to [lift the impediment.]" even though she has already apologized two times. (Tr. 67-68, 129-30, 175-76; GC Exh. 1(e) at 3; R Br. 4-7, 9-10.) This long string of factual inaccuracies by Respondent raises issues as to the overall veracity of its positions in this case.

B. The Respondent had a legitimate interest in temporarily banning Ms. Shelby from the hiring hall premises because Ms. Shelby's October 4 profanities were unprovoked and directed at Respondent's agents making Ms. Shelby's conduct unprotected by the Act.

Paragraphs 6(a) and (b) of the complaint collectively allege that on or about October 4, the Respondent, by Mr. Taylor, threatened Ms. Shelby with exclusion from the Respondent's hiring hall because she engaged in union and other concerted activities, including her challenge of the Respondent's system regarding maintenance of her skill sheet showing the jobs she was qualified to perform pursuant to the Respondent's employment referral system and Mr. Taylor summoned the police in order to have Ms. Shelby removed from the hiring hall premises because of her union and concerted activities.[10] (GC Exh. 1(e) at 3.)

It is not disputed that the Union has exclusive hiring hall arrangements with employers for construction work in and around Las Vegas, Nevada.

It is well established that as the operator of an exclusive hiring hall, a union owes a duty of fair representation to members who use the hall. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith," 386 U.S. at 190. Where a union causes, attempts to cause, or prevents an employee from being hired or otherwise impairs the job status of an employee, it demonstrates its power and influence over the employee's livelihood so dramatically as to compel an inference that the effect of the union's actions is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome this inference or rebut this presumption, by proving that the action was necessary to the effective performance of its function of representing its constituency.[11] See, e.g., *Teamsters Local 456 (Louis Petrillo Corp*.), 301 NLRB 18, 22 (1991).

The legitimate interests of a union must be carefully balanced against the interests of individual employees when those employees are engaging in protected activity. *International Longshoremen's Ass'n., Local No. 341, AFL-CIO*, 254 NLRB 334, 337 (1981). Where activity is unprotected, however, there is nothing to balance against the union's need to effectively represent its constituency. Id.

In this case, everyone agrees that Ms. Shelby's activities leading up to her profanity-laced outburst on October 4 were protected activities. (Tr. 113, 139-41, 322; R Br. 7.) I find that under the circumstances of this case, once Ms. Shelby directed her first profanity at Ms. Lucero and was simply asked to leave the hiring hall premises, her protected activity crossed the line and became unprotected. Moreover, there was no protected activity once Ms. Shelby continued to direct additional profanities at Ms. Lucero and Mr. Taylor. The matter escalated not because of Ms. Lucero's actions but because of Ms. Shelby's loss of temper and her inability to control

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[10] As pointed out by the Acting General Counsel, the fact that portions of the charge were dismissed because they were time-barred by Section 10(b) is not dispositive of whether Respondent had committed unfair labor practices against Ms. Shelby in the past or whether its recent conduct with Ms. Shelby since August were provocative on the part of Respondent. GC Br. 26; R Exh. 2.

[11] A union may also show it was acting pursuant to a valid union-security clause; however, such is not an issue here.

her actions leading to her continued string of epithets directed at Respondent's agents when Mr. Taylor finally asked her to calm down and she refused until the police finally arrived.

While cursing in general may have been common at the hiring hall, it is apparent that profanities *directed at* Respondent's agents never occurred before Ms. Shelby's October 4 outburst. The distinction between general cursing at work and swearing toward someone is that one can act belligerently, i.e. irate, eager to fight, and out of control but when the profanity becomes directed at a target, one crosses the line from just blowing off steam to becoming a safety concern.[12] I find that a union member occasionally blowing off steam was a common occurrence at the hiring hall but directing profanities toward a dispatcher target had not occurred before Ms. Shelby's outburst on October 4 caused concern and nervousness to Ms. Lucero.

While I agree that Respondent's reliance on *Atlantic Steel Co*., 245 NLRB 814 (1979), to evaluate a confrontation between a member and a union agent is misplaced, the case relied on by the Acting General Counsel is also distinguishable. The Board in *Longshoremen Local 333*, 267 NLRB 1320, (1983), found that Moore was exercising his protected right to question the union's authority with respect to its rotation policy and, unlike our facts, that it was not unusual for Moore and union official Howell to resort to strong language laced with profanity directed toward each other, an occurrence which the Board found was not unusual on the docks and could not justify the union's reprisal against Moore by having him removed from the crew. In contrast, Ms. Lucero credibly opined that no one has previously directed their profanities at her as dispatcher as Ms. Shelby did on October 4. Even Ms. Shelby admits that it is not right to direct profanities at union agents and she would not want similar treatment at work. (Tr. 227-28.)

The Acting General Counsel also argues that Ms. Lucero's actions on October 4 were the result of personal animus as evidenced by her deletion of Ms. Shelby's skills, her previous raised voice to Ms. Shelby and her raised voice again on October 4. (GC Br. 28.) I find that no evidence was presented to substantiate this claim. The hiring hall rules plainly state that members can obtain confirmation numbers to prove their compliance with roll call rules yet nothing was presented to show that Ms. Shelby's missed roll call in November 2010 was suspect. (See GC Exh. 3 at 1.) Also, the deletion of Ms. Shelby's skills through the passage of time or lack of experience was not proven wrong by any evidence to the contrary. Finally, I do not find that Ms. Shelby's profanity outburst was provoked by Ms. Lucero raising her voice or in any other way. Raised voices unlike profanities directed toward dispatchers were a common occurrence and sometime a necessity due to the think glass at the dispatch window. Again, I find that Ms. Shelby's own temperament and frustrations, while in general not uncommon among other construction worker members, crossed the line and became unprotected activities once the profanities surfaced and were directed toward the union's agents.

I therefore find that Ms. Shelby's conduct on October 4 was unprotected once she directed a profanity toward Ms. Lucero and the Respondent did not violate Section 8(b)(1)(A) of the Act. Alternatively, I further find that the Respondent's action in asking Ms. Shelby to leave the hiring hall and having her escorted off the premises on October 4 because of her use of

[12] While the analysis is different in the context of the employer-employee relationship as compared to the union member-union agent relationship here, the distinction between profanities commonly used in the workplace as not jeopardizing protection under the Act versus the uncommon practice of directing profanities at an individual creating unprotected activity under the Act is the same. See, e.g., *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807-08 (2004) (Unprotected conduct where profanities directed toward supervisors); *Air Contact Transport, Inc*. 340 NLRB 688, 690 (2003)(Same).

profanities directed toward union agents and her increasingly belligerent conduct was necessary for the effective performance of the Respondent's function of representing its constituency. I further find that under the circumstances of this case, the union did not fail to represent Ms. Shelby fairly. I further find that the Respondent did not violate Sections 8(b)(1)(A) of the Act as alleged in the complaint and that portion of the complaint is dismissed.

C. The Respondent union has failed to show adequate justification for permanently barring Ms. Shelby from unfettered use of its exclusive hiring hall system in violation of Section 8(b)(1)(A) and (b)(2) of the Act.

Paragraphs 7(a)(b), and (c) of the complaint collectively allege that because of Ms. Shelby's union and other concerted activities, since on or about October 4, the Respondent has imposed a rule restricting Ms. Shelby's access to the Respondent's hiring hall without police escort and by this conduct the Respondent has restricted the ability of Ms. Shelby to be referred to employment with the Employer and other employers.[13] (GC Exh. 1(e) at 3.)

Respondent readily admits that since October 4, Ms. Shelby's ability to freely access the hiring hall has been restricted by the unwritten union rule that Ms. Shelby gain access to the hiring hall only if she has a police escort. (R. Br. 9-10, 13.) In fact Respondent further admits that:

> We agree that if Ms. Shelby does not ask to clarify whether she could come to the hall without police escort, she may be ever so slightly inconvenienced by being escorted by the police.

(R Br. 9.)

Both Ms. Shelby and Mr. Taylor reasonably believed this to be the permanent rule applied against Ms. Shelby for being trespassed off the hiring hall premises on October 4. (Tr. 63-66, 85, 174; GC Exh. 5 at 2.) Respondent imposes its rule restricting Ms. Shelby's access to the exclusive hiring hall and refuses to remove the restriction despite her two apologies, the charge, complaint filing, and hearing in this matter. In the past, Respondent's reversion of obtaining trespass notices with access restrictions against other members has been limited to threats of violence and destruction of property - none of which are involved in this case – followed by the issuing of restraining orders. (See GC Exh. 4.)

Because Ms. Lucero's husband is a Las Vegas policeman, Respondent effectively prevents Ms. Shelby from accessing the hiring hall without a police escort or risk a further arrest for trespassing should Ms. Lucero decide for any reason to call her husband and report Ms. Shelby for trespassing. The Respondent agrees that such a rule interferes with Ms. Shelby's ability to physically appear to gain access to the out-of-work list or for roll call four times a year as required by the union's rules. (R Br. 8.) In addition, Ms. Shelby is prevented from other rights enjoyed by union members such as freely visiting, updating her skills, filing grievances, and verifying her leave and benefits on the hiring hall's second floor department without a police escort.

[13] Because the complaint allegations are limited to those in paragraphs 6 and 7, I disregard any new allegations that the Respondent's actions were the result of any picketing activity by any group or were based on any racial discrimination as this is unrelated to the complaint allegations and there was no attempt to amend the complaint at hearing. .

As a result, I find that the Respondent's restricted access rule against Ms. Shelby causes, attempts to cause, or prevents her from utilizing the hiring hall despite her continued status as a dues paying member and interferes with her employment given the hiring hall's exclusive nature and prevents or interferes with Ms. Shelby being hired or otherwise impairs the job status of Ms. Shelby. Moreover, I find that the restricted access rule demonstrates the Respondent's power and influence over Ms. Shelby's livelihood so dramatically as to compel an inference that the effect of the Respondent's actions in implementing the restricted access rule is to encourage union membership on the part of all employees who have perceived the display of power.

Respondent further argues that Ms. Shelby must take some additional unwritten affirmative action of asking the Respondent to remove or rescind the restricted access rule to get rid of the police escort condition before it is lifted. (R. Br. 15.) I find that Ms. Shelby has adequately apologized for her October 4 outburst and that the Respondent must actively rescind the unlawful restricted access rule that applies only to Ms. Shelby. Instead, I find that the Respondent is obligated to affirmatively rescind the ongoing permanent restrictions of requiring a police escort for Ms. Shelby to gain access to the hiring hall.

As conceded by Respondent, the union violates Section 8(b)(2) and 8(a)(3) where there is some impact upon the employment relationship or when the union affects the employment of a member. (R. Br. 8 citing *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954). A union may breach its duty of fair representation without committing an unfair labor practice and vice versa. *Breininger v. Sheet Metal Workers*, 493 U.S, 67, 86-87 (1989). Once again, a union breaches its duty of fair representation if its actions affecting employees whom it represents are arbitrary, discriminatory, or in bad faith and an action is arbitrary, in turn, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." (R Br. 10, quoting *Air Line Pilot Ass'n. v O'Neill*, 499 U.S. 65, 67 (1991); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

The Board has held that the three-pronged *Vaca v. Sipes* standard applies to all union activity, including the operation of a hiring hall. *Plumbers Local 342 (Contra Costa Electric*), 329 NLRB 688 (1999), enf. denied sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000).[14] When a union purposely departs from the rules governing the operation of its hiring hall, it dramatically displays its power to affect an employee's livelihood. Such a deliberate departure constitutes arbitrary, discriminatory, or bad-faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was necessary to the effective performance of its representative function. *Plumbers Local 342 (Contra Costa Electric),* 336 NLRB at 550, enfd. sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction*), 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983). Thus, a union bears the burden of establishing that its conduct was necessary for effective performance of its representational function. *Teamsters Local 519 (Rust Engineering*), 276 NLRB 898, 908 (1985),

[14] In *Jacoby*, supra, the D.C. Circuit disagreed with the Board's application of a unitary duty-of-fair-representation standard to all union activity, holding that unions owe a heightened duty in the operation of a hiring hall. The Ninth Circuit has agreed with the D.C. Circuit in this regard. *Lucas v. NLRB*, 333 F.3d 927, 934-35 (9th Cir. 2003). I discuss this issue more fully hereafter. I need not decide here which standard should apply because, for reasons explained below, Respondent's arbitrary imposition of its restricted access rule applied only against Ms. Shelby is unlawful under either a unitary or a heightened duty standard.

enfd. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596 (1983).referrals are made

While admitting that the Respondent's restricted access rule may actually restrict Ms. Shelby's ability to fulfill her requirement to physically appear at the hiring hall to gain access to a variety or employment and union activities as referenced above, Respondent also argues that since Ms. Shelby has remained fully employed since November 2011, the questioned rule's impact on Ms. Shelby's employment has been speculative at best since she has not been on the out-of-work list or even eligible for it. (R Br. 8.) This argument lacks merit, however, because the standard mentioned above does not apply simply to situations when a union member is unemployed due to a union's unlawful conduct but also where the union attempts to cause or prevents an employee from being hired or otherwise impairs the job status of an employee. See *Teamsters Local 456 (Louis Petrillo Corp*.), 301 NLRB 18, 22 (1991). Here, by implementing the restricted access rule against Ms. Shelby, I find that the Respondent has impacted Ms. Shelby's employment by attempting to cause or preventing her from being employed or impairing her job status as the rule interferes with Ms. Shelby's ability to maintain her skills, file grievances, and participate in the Respondent's out-of-work list by arbitrarily restricting her access to the hiring hall. Moreover, I further find that the Respondent has failed to prove that imposing its permanent restricted access rule against Ms. Shelby was necessary to the effective performance of its function of representing its constituency especially in light of the considerable passage of time without further incident in the limited times Ms. Shelby accessed the hiring hall with her police escort.

Though it may be true that Respondent had a legitimate reason to limit her access and ask Ms. Shelby to leave the hiring hall premises on October 4 when she swore at union agents and refused to leave the hall, the same is not true after she calmed down later that day. To impose on her an ongoing permanent restriction preventing her free access to the premises without a police escort, however, after October 4 is arbitrary and irrational as she did not threaten violence against anyone or property damage against the facility as other trespassed members had which also resulted in the union obtaining restraining orders in the past. The Respondent has treated Ms. Shelby arbitrarily and disparately[15] by imposing the police escort rule on her without any evidence that she poses a threat or caused property damage to the facility. Also, Respondent has not shown that Ms. Shelby's past conduct warrants imposition of the restricted access rule against her. See e.g., *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000), revd. 333 F.3d 927 (9th Cir. 2003)(Member barred from hiring hall after 15 years of misconduct); *Int'l Longshoremen's Ass'n, Local 341*, *AFL-CIO*, 254 NLRB 334, 337 (1981)(Member barred from hiring hall because member instigated wildcat strike and picketing activities in violation of CBA terms).

By a preponderance of the evidence I find that Respondent has not met its burden of establishing that its permanent restricted access rule against only Ms. Shelby was necessary for effective performance of its representational function. Instead, I find that the restricted access rule is overly burdensome to Ms. Shelby and unnecessary in light of the factual and legal landscape since October 4, 2011, the time of the union's implementation of the rule. I further find that the Respondent's behavior in implementing its unwritten restricted access rule against

[15] While the Acting General Counsel argues that the Respondent's restricted access rule against only Ms. Shelby also breached the duty of fair representation as being discriminatory, I do not agree as I do not find any evidence of animus or any suggestion in the record supporting a pretext for intentional discrimination or suggesting any other improper motive on the part of the Respondent.

only Ms. Shelby is so far outside a wide range of reasonableness as to be irrational. Accordingly, in agreement with the Acting General Counsel, I find that Respondent violated Section 8(b)(1)(A) of the Act by imposing a restricted access rule against Ms. Shelby's access to the hiring hall which has restrained and coerced Ms. Shelby in the exercise of her rights guaranteed in Section 7 of the Act. I further find that the Respondent did not violate Section 8(b)(2) of the Act as alleged in the complaint and that portion of the complaint is dismissed.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. By arbitrarily requiring Ms. Shelby to be subject to a permanent restricted access rule requirement that she obtain a police escort to gain access to the hiring hall when her conduct on October 4, 2011, did not involve any threats of violence or property damage, Laborers' International Union of North America, Local 872, AFL-CIO has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

3. The Respondent did not otherwise violate the Act as alleged in the complaint.

REMEDY

The appropriate remedy for Laborers' International Union of North America, Local 872, AFL-CIO's unlawful conduct is an order requiring the Respondent to cease and desist and to take certain affirmative action. Specifically, the Respondent will be required to rescind its rule preventing Ms. Shelby from gaining access to the union's hiring hall facility without a police escort and the Respondent will contact the Las Vegas police department to report the rule rescission and acknowledge to the police that Ms. Shelby is a welcome dues paying member without any restrictions on her access to the hiring hall facility. The Respondent shall also be required to remove from its files any reference to Ms. Shelby's ongoing access restriction beyond October 4, 2011, and to notify Ms. Shelby in writing that this has been done. In addition, the Respondent will be required to post a notice in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010). See, e.g., *Teamsters Local 25*, 358 NLRB No. 15 (2012).

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended[16]

ORDER

The Respondent, Laborers' International Union of North America, Local 872, AFL-CIO, its officers, agents, and representatives, shall

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Limiting or restricting union member Stephanie Shelby's access to the hiring hall in any way including the requirement that have Ms. Shelby access to the hiring hall only with a police escort.

(b) Refusing to refer Stephanie Shelby for employment for arbitrary, invidious, or capricious reasons.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind Respondent's restricted access rule as applied to union member Stephanie Shelby and within 14 days from the date of the Board's Order, Respondent will also notify the Las Vegas police department in writing to report the rule rescission and acknowledge to the police that Ms. Shelby is a welcome dues paying member without any restrictions on her access to the hiring hall facility.

(b) Within 14 days from the date of the Board's Order, the Respondent shall also be required to remove from its files any reference to Ms. Shelby's ongoing access restriction beyond October 4, 2011, and to notify Ms. Shelby in writing that this has been done.

(c) Within 14 days after service by the Region, post at its office and hiring hall in Las Vegas, Nevada copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has ceased operating the hiring hall involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former members whose names appeared on the Respondent's hiring hall list at any time since October 2011.

(d) Within 14 days after service by the Region, sign and return to the Regional Director for Region 28 sufficient copies of the notice for posting by Perini Building Company, and other employers signatory to the construction work collective-bargaining agreements with the Respondent, if willing, at all places where notices to employees are customarily posted in the Las Vegas metropolitan area.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 18, 2012.

Gerald M. Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly;

WE WILL NOT threaten to exclude you from the Union hall or have you arrested because you engage in Union or other concerted activities including challenging the system of maintaining lists of skills you are qualified to perform.

WE WILL NOT tell you that you are banned from the Union hall or provide that you may not access the Union hall without police escort because of your Union or other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Section 7 of the Act.

WE WILL withdraw the restriction of access to the Union hall without police escort we issued to Stephanie Shelby, and

WE WILL expunge from our records any reference to this restriction of access from after October 4, 2011.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 872, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want Charging Party representation and it investigates and remedies unfair labor practices by employers and Charging Parties. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 Las Vegas Blvd. South, Suite 400

Las Vegas, NV 899101-6637

Hours: 8:15 a.m. to 4:45 p.m.

702-388-6012.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 702-388-6012.